

Exhibit A

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17 UNITED STATES DISTRICT COURT
18 EASTERN DISTRICT OF CALIFORNIA

19 UMG RECORDINGS, INC., et al,

20 Plaintiffs,

21 v.

22 RICHARD SINNOTT dba MARYSVILLE
23 FLEA MARKET,

24 Defendant.

CASE NO. CIV S-02-2153 MCE PAN

EXPERT REPORT OF DR. STEPHEN M.
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OCT 03 2003

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

BACKGROUND AND QUALIFICATIONS

I am currently a Professor of Marketing and Dean's Council Distinguished Scholar in the WP Carey School of Business at Arizona State University. I earned my BA in Economics from Stanford University, and my MBA and PhD in Marketing from the University of California at Berkeley. My area of expertise is academic research on consumer behavior and marketing issues. I have published a number of papers in leading peer-reviewed academic journals which focus on these areas. For instance, I have published in the *Journal of Consumer Research*, *Journal of Consumer Psychology*, *Journal of Marketing Research*, *Marketing Science*, *Marketing Letters*, and the *Annual Review of Psychology*. I am the winner of two major awards in the fields of marketing and consumer behavior. First, I am the winner of the 2001 William F. O'Dell Award. This award is given annually to the article appearing in the *Journal of Marketing Research* that has made the most significant long-term contribution to the marketing discipline in the five year period 1996-2001. In addition, I was a finalist for the 2002 William F. O'Dell Award. Second, I am the winner of the 2001 Early Career Contribution Award from the Society for Consumer Psychology - Sheth Foundation. This award is given annually to the most productive researcher in the field of consumer behavior/marketing who has been a faculty member for less than ten years.

I am currently an associate editor at the *Journal of Consumer Research*, and serve on the editorial review boards at the *Journal of Marketing Research* and *Marketing Letters*. As an associate editor and editorial review board member, I review many papers for those journals, and help determine whether or not papers will be accepted for publication. I am also the winner of the Outstanding Reviewer Award for 2002 at the *Journal of Consumer Research*.

I currently teach the introductory marketing course to MBA students, and previously taught a PhD seminar in consumer behavior, and another PhD seminar on research methods. Finally, I have taught classes on retail management and marketing management at the undergraduate level. My work experience includes two years as an assistant buyer for a major

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1 retailer. For a list of my other credentials, including my expert testimony within the past four
2 years, please see my curriculum vitae, which is attached as Exhibit A to this Report.

3 I am being compensated for my work at the rate of \$400 an hour.
4

5 SCOPE OF WORK

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7 I was asked by the counsel for the plaintiffs in the lawsuit entitled UMG Recordings, Inc.,
8 et al. v. Sinnott (E.D. Cal, case no. CIV-S-D2-2153 MCE TAN) to analyze how the sales of
9 infringing recorded music (i.e., unauthorized duplications of copyrighted sound recordings) at flea
10 markets generally, and Marysville Flea Market specifically, may or may not increase the number
11 and types of customers that are drawn to the flea market, and the benefits that flow from any
12 increase in those customers that are drawn to the flea market. In preparing this report, I reviewed
13 the transcripts of the depositions of Richard Sinnott, Mike Sheppard, Kevin Warner and Pat
14 O'Brien, and their respective exhibits, taken in this case, and also reviewed the DVDs of the
15 Marysville Flea Market, labeled P0833-34.

16 SUMMARY OF CONCLUSIONS

17

18
19 My main conclusions are that infringing recorded music sold at the Marysville Flea Market
20 serves as a substantial draw to consumers because (1) recorded music adds variety to the available
21 product mix, which is an important benefit to the Marysville Flea Market; (2) infringing recorded
22 music, compared to other types of merchandise, is a particularly attractive product category to the
23 Marysville Flea Market visitors; (3) infringing recorded music that consists of unique
24 compilations of songs allows the Marysville Flea Market to offer a unique benefit not available at
25 other outlets; and (4) the below market prices of infringing recorded music at the Marysville Flea
26 Market serves as a powerful incentive for consumers to shop there. In addition, I conclude that,
27 since infringing recorded music is a powerful means of increasing the draw of consumers to the
28

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1 Marysville Flea Market, that this results in a direct financial benefit to the flea market owner,
2 Richard Sinnott.

3 4 FINDINGS AND CONCLUSIONS

5 6 1. Variety of Products and Services at Multiple Retail Outlets

7 Multiple retail outlets such as flea markets sell a variety of products and services. Variety
8 is an important issue in defining any common area that provides multiple retail outlets to
9 customers, such as flea markets, shopping malls, shopping centers, and, to some extent,
10 department stores.¹ Such multiple retail outlets have several basic factors in common, including a
11 defined area with many independent retail locations that provide common amenities such as
12 parking, bathrooms, security, and ATM machines. I refer to them collectively in this Report as
13 "multiple retail outlets." While there is some academic literature specific to flea markets, that
14 literature frequently refers to studies involving other multiple retail outlets, which are equally
15 relevant to flea markets.

16 The Marysville Flea Market fits the profile of a multiple retail outlet. It is located on an
17 enclosed lot, with separate booths for vendors (although not all are occupied at all times the flea
18 market is open). The booths are independent retail outlets and sell a variety of products. The
19 Marysville Flea Market offers parking, bathrooms, utilities, security, and concessions. Flea
20 markets, such as the Marysville Flea Market, are an important type of multiple retail outlet, given
21 that an article in *Forbes* estimated that flea markets sell between \$5 and \$10 billion worth of
22 goods and services a year.² The factors discussed in this Report that impact the success of
23 multiple retail outlets in general also apply to the Marysville Flea Market, and this Report refers to
24 those studies, as appropriate.

25 A greater variety of products and services helps retailers and multiple retail outlets in
26 general. Consumers are often drawn to multiple retail outlets because of the greater variety of
27 product categories and assortment of merchandise that can be found there compared to individual
28 stores. One major reason for this is the convenience of shopping in one location. Another reason

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1 is that members of families can shop at one location. Also, people can make a "day" out of a trip
2 to a multiple retail outlet, in effect, using it as a form of entertainment. For example, a multiple
3 retail outlet selling both music and clothing can be more likely to draw customers than one that
4 only sells clothing. The Marysville Flea Market is just such a market, offering recorded music,
5 clothing, as well as a variety of other products.

6 I start with a few core concepts. Affinity and retail balance are the most important
7 determinants of the store composition at a multiple retail outlet.³ Affinity refers to a situation
8 where stores in the multiple retail outlet blend, cooperate, and complement each other. "When
9 affinity is strong, the sales of each store are greater, due to the high customer traffic, than if the
10 stores are apart."⁴ Retail balance refers to the mix of the stores in the multiple retail outlet.
11 "Proper balance occurs when.... a range of goods and services is provided to foster one-stop
12 shopping, there is an adequate assortment within any category, and there is a proper mix of store
13 types (balanced tenancy)."⁵ Other academic research concludes that the ideal outlet mix should
14 strive to achieve: "a balanced diversification of shops in the center by offering a wide range of
15 products and services," "a synergy between the satellite tenants," "a logical layout of the shops,"
16 "enough variety to create the maximum attractiveness to the population of the specific trade area,"
17 and "maximum sales potential in the trade area."⁶ In other words, flea market owners should
18 prefer that their vendors offer a wide range of products, as this will maximize the attractiveness of
19 the flea market to consumers.

20 Another aspect of merchandise variety is referred to as "scrambled merchandising." This
21 occurs when the retailer adds products that may be somewhat unrelated to each other, but that are
22 useful because they help to build overall store traffic. "Scrambled merchandising is popular for
23 many reasons: Retailers want to increase overall revenues; fast-selling, highly profitable goods
24 and services are usually the ones added; consumers make more impulse purchases; people like
25 one-stop shopping; different target markets may be reached; and the impact of seasonality and
26 competition is reduced."⁷ Recorded music generally, and infringing recorded music specifically,
27 fits the profile of scrambled merchandise – it is low priced, highly profitable, and it is not
28 seasonal. Multiple retail outlet owners, such as the Marysville Flea Market owner, directly benefit

1 from scrambled merchandising, and by encouraging and permitting the sale of recorded music
2 since it adds variety to the mix of available items for purchase.

3 Much academic research has also shown the importance of variety in attracting consumers
4 to a multiple retail outlet, including, for example, (i) 827 consumers were surveyed in research that
5 examined the effect of assortment (product selection, variety of stores, etc.) on the degree of
6 customer preference for a multiple retail outlet.⁸ This research found a statistically significant,
7 positive relationship between assortment and multiple retail outlet preference. In fact, assortment
8 was found to be more important than any other variable as a determinant of preference, including
9 variables such as promotions, parking, and the availability of food; (ii) 438 shoppers were
10 surveyed at a mall, and it was found that the variety of outlets had the greatest effect on shoppers'
11 reported excitement at the mall.⁹ In fact, the variety had a stronger effect on customer excitement
12 (i.e., the stimulation level caused by shopping) than any other factor, including involvement (i.e.,
13 the importance of shopping) or the physical environment (i.e., the retail outlet layout).
14 Furthermore, this research found that the excitement caused by greater variety resulted in a
15 stronger desire to stay and shop at the mall, and to come back to the mall again in the future; (iii)
16 712 consumers were surveyed about what causes them to browse at a particular retailer, and it was
17 found that "lots to see" had a statistically significant, positive effect on likelihood of browsing.¹⁰
18 Browsing also is important to the multiple retail outlet, since browsers are more likely to buy
19 merchandise at other stores and to buy concessions and food; (iv) an experiment with 405
20 consumers found that a greater assortment of products is a very important element in the choice of
21 a multiple retail outlet.¹¹ In fact, this research finds that "an attractive mix of merchandise can
22 compensate for larger travel times or smaller center sizes." This also may be of particular
23 relevance to the Marysville Flea Market in that it is not located in a large urban area and requires
24 some travel time to reach. In addition, this research concluded, based on a review of other
25 academic literature, that "Clearly, the available selection is, with travel time, the most important
26 determinant of ... consumer expenditure at retail outlets;" (v) 405 people participated in an
27 experiment reported in another paper.¹² This research finds that a greater assortment of products
28 has a statistically significant, positive effect on likelihood of shopping at that store.

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1 The broader product mix at a flea market clearly is an important draw for consumers.¹³
2 Thus, consumers are specifically drawn to flea markets due to the greater variety and product mix
3 that they expect to find. For example, (i) 670 customers were surveyed at a flea market, and a
4 statistically significant, positive relationship was found between the response to the statement
5 "There is a good selection" and consumer expenditures.¹⁴ (ii) 236 shoppers were surveyed at
6 three different flea markets, and shoppers mentioned the "variety of items displayed" as what they
7 most like about flea markets.¹⁵

8 While it has clearly been established that a greater variety at multiple retail outlets attracts
9 customers, other research has focused on a related retailing trend, which also supports this
10 conclusion. This trend is for people to be increasingly drawn to sites that offer "one-stop
11 shopping," where a greater variety of merchandise is available in one location.¹⁶ For example,
12 "supermarkets have come to offer many categories (e.g., fresh baked goods, deli products, salad
13 bars, fast food, liquor, pharmaceuticals, video rentals, select hardware, banking services, flowers)
14 that were once sold in smaller more specialized stores."¹⁷ This trend has also been shown in the
15 migration of shoppers from department stores to discount stores, which is attributed to some
16 degree to the lower prices and greater assortment at the discount stores.¹⁸ In fact, there is also a
17 trend now for discount stores such as Wal-Mart to sell a greater variety of merchandise in
18 "superstores." Finally, two of the most successful online shopping sites, Amazon and Ebay, both
19 offer a much greater variety of merchandise than typical shopping sites.

20 In sum, it is clear that greater variety of available products helps retailers and multiple
21 retail outlets, including the Marysville Flea Market, in many ways. Greater product variety
22 increases consumer excitement, outlet preference, browsing, outlet choice, amount spent, and falls
23 in line with a general trend to offer one-stop shopping. This benefits the Marysville Flea Market
24 owner, as the increased variety increases consumer foot traffic, amount purchased, the sales of
25 related products and services, and greater overall spending. It also stimulates sales from
26 concessions, such as food, beer and snacks, which are controlled by the Maryville Flea Market
27 owner. In turn, more customer traffic to a multiple retail outlet makes the outlet more attractive to
28 additional vendors, who will want to occupy space in that outlet. The flea market receives

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1 increased reputation as a place to go to shop, which in turn draws additional customers and
2 additional outlets, which in turn increase both the sales from concessions owned by the flea
3 market and the demand for, and price of, space to retail outlets, and ultimately the value of the flea
4 market itself. If there are vacant booths, or room for expansion, as there is at the Marysville Flea
5 Market, this is an additional benefit to the flea market owner.

6 In the section above, I concluded that a greater variety of merchandise serves as a powerful
7 draw for customers at the Marysville Flea Market. In the next section, I consider in more detail
8 how increasing variety by specifically adding recorded music can be an effective method for
9 increasing variety and the attractiveness of the flea market.

10 2. Importance of music outlets to draw in customers

11 In the section above, I showed how a greater variety of products helps to attract customers
12 to the Marysville Flea Market. Next, I consider the specific benefits to the flea market owner from
13 having vendors that offer recorded music.

14 Recorded music ranks high in importance in terms of products preferred by consumers in
15 multiple retail outlets. In one research study, 319 consumers were surveyed to examine how
16 music outlets affect the overall success of multiple retail outlets.¹⁹ The shopping category of
17 "records/tapes/CDs" was judged as the seventh most preferred product type to be purchased at a
18 mall, out of a total of twenty one different categories. Another academic paper surveyed 307
19 household about the types of stores they most prefer in multiple retail outlets.²⁰ "Music/CD
20 shops" were the fourteenth most preferred store in a multiple retail outlet, out of 46 different types
21 in the survey. This clearly shows that consumers strongly prefer music outlets in multiple retail
22 outlets, and thus that these types of stores act as powerful draws. This conclusion is also
23 supported by a recent *Wall Street Journal* article. This article finds that "Big-box retailers have
24 more pricing flexibility and already lowball their CDs to draw customers to bigger-ticket items.
25 Analysts estimate that CDs account for between 5% and 20% of Best Buy's sales, but that they
26 draw as many as 50% of the store's customers."²¹

27 Given that consumers are clearly drawn to multiple retail outlets that contain music outlets,
28 it is also useful to analyze how this can financially benefit the outlet owner. To consider this

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1 issue, multiple retail outlet rents were examined at 293 centers, and it was determined that the type
2 of store in the multiple retail outlet is an important determinant of multiple retail outlet base rents.
3 In particular, the category of "books/music/photography" has a statistically significant, positive
4 effect on the ability of multiple retail outlets to charge higher rents.²² Other categories of stores
5 have insignificant effects (e.g., fashion merchandise, hair salons, pharmacy), while other factors
6 have negative effects (e.g., center turnover, size). This shows that recorded music outlets are an
7 important draw to a flea market such as the Marysville Flea Market, since music is a particularly
8 important category to consumers, and it shows that the flea market owner can directly benefit from
9 this since recorded music vendors increase the overall success of the flea market.

10 In the next section, I consider a particular benefit of infringing recorded music – namely,
11 that it can offer unique compilations of songs and artists that cannot be purchased at any other type
12 of multiple retail outlet.

13 3. Unique merchandise

14 In the sections above, I showed how a greater variety of products serves as a draw for
15 consumers to visit the Marysville Flea Market, and how recorded music outlets serve as an
16 attraction. I next consider how the degree to which a product offers unique benefits can also serve
17 as a draw to flea markets. Flea markets often offer unique products that are not found at other
18 types of multiple retail outlets. As a co-manager at a flea market said, "You find things out here
19 you would never see anywhere else."²³ In addition, an in-depth study of a flea market concluded
20 that "From the buyers perspective, the broad array of swap meet offerings also affords some of the
21 magic and surprise of a treasure hunt."²⁴

22 A unique product found at flea markets that can be particularly successful is infringing
23 recorded music that contains a unique compilation of songs. For example, if a customer is
24 interested in recording artists such as Christina Aguilera and Britney Spears, he/she may be able to
25 find a CD or tape that is a unique compilation of songs from the two artists that is not available at
26 other multiple retail outlets. Just such an infringing CD was purchased at the Marysville Flea
27 Market and is subject to this litigation. Or, a customer who is interested in dance music may be
28 able to find a CD or tape that contains a unique compilation of dance songs by various artists, that

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1 is not available at other multiple retail outlets. Similar CDs also were purchased at the Marysville
2 Flea Market and are subject to this litigation. This infringing recorded music sold at flea markets
3 offers a unique advantage, in that it is sometimes a compilation of music that cannot be found
4 anywhere else and frequently combines more individual songs on a single disc or tape than are
5 found on legitimate recorded music. Again, these kinds of CDs were purchased at the Marysville
6 Flea Market and are subject to this litigation. Such unique products serve to draw customers into a
7 flea market.

8 In general, a major competitive advantage for retailers and multiple retail outlets is the
9 sales of unique merchandise that is only available at their outlets, and that the competition does
10 not sell.²⁵ My own independent research examines factors that influence the degree to which
11 consumers prefer features which are either unique or common to products, and I find that unique
12 features are particularly important when consumers are choosing which type of product to buy.²⁶
13 One type of unique product which is gaining popularity is a branded music compilation that is sold
14 only at one particular retailer. For example, Crate & Barrel quickly sold out of a jazz mix album
15 called "A Cool Christmas."²⁷ A related phenomenon is for online music retailers to benefit by
16 selling unique songs that are difficult to find elsewhere. For example, 37% of Internet users cited
17 "rare tracks" as the most important attribute of online music retailers.²⁸ This means that the
18 Marysville Flea Market has a competitive advantage since unique compilations of music are sold
19 there which cannot be found at other retail stores, and thus consumers must shop at the Marysville
20 Flea Market to acquire this merchandise.

21 The Marysville Flea Market apparently has had at least one, and at times more than one,
22 vendor selling infringing recorded music. Although multiple retail outlets may contain more than
23 one outlet that sells a specific product, such as recorded music, often there is only one such outlet.
24 The existence of one vendor selling a unique product is sufficient to draw customers to the outlet
25 generally, because consumers are drawn to multiple retail outlets where a "special store" is located
26 that is particularly attractive to them. Studies support that conclusion: for example, (i) 827
27 consumers were surveyed, and a "special store" that offered merchandise that consumers liked was
28 particularly appealing;²⁹ (ii) 600 other consumers at three malls were surveyed about their

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1 shopping behavior at malls.³⁰ It was found that "In the mall, certain retailers are especially fun to
2 visit because they sell products that interest me," was a key determinant of mall shopping
3 likelihood. Consumers are often attracted to a particular, unique store that offers merchandise
4 which particularly appeals to them. As mentioned above, infringing recorded music offering
5 unique compilations is an effective means for building customer interest, as the rarity of these
6 compilations makes them particularly attractive. In fact, product rarity is one of the most effective
7 means for selling products, and marketers often try to make their products more rare by offering
8 limited editions and by purposely limiting supply.³¹

9 In sum, when the Marysville Flea Market offers infringing recorded music that is
10 composed of a unique mix of songs and artists, this is a particularly strong draw for consumers; as
11 the uniqueness and rarity of the music is a very important benefit. In the next section, I consider
12 another important benefit of infringing recorded music – its below market prices.

13 4. Prices below market

14 Infringing recorded music at flea markets is often priced below the typical retail price.
15 These low prices draw consumers into a flea market. In this section, I first consider how low
16 prices help multiple retail outlets in general, and then consider how low prices of infringing
17 recorded music help the Marysville Flea Market.

18 Competitive prices are an important factor in determining the success of a retailer or a
19 multiple retail outlet. My own independent research has found that lower prices serve as a
20 powerful incentive for buyers to purchase products.³² Other literature supports that conclusion.
21 For example, (i) One survey of 319 consumers finds that "price competitiveness" is judged as the
22 most important motive for shopping at a mall;³³ (ii) another survey of 236 shoppers at three
23 different flea markets found that shoppers mentioned "bargains" as the second most important
24 factor to them in shopping at flea markets;³⁴ (iii) finally, the appeal of flea markets are due to
25 "consumer interest in bargaining," and "low prices."³⁵ Prices for infringing recorded music sold
26 at the Marysville Flea Market are as low as \$2.50 (for cassette tapes) or \$5.00 (for CDs),
27 frequently significantly below prices charged for legitimate recorded music at other retail outlets.
28 Since the Marysville Flea Market vendors offer infringing recorded music at prices below market

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1 for legitimate recorded music found at other multiple retail outlets, this serves as a significant
2 incentive for consumers to shop at that market.

3 The attractiveness specifically of low-priced recorded music as a draw is further supported
4 by reference to "loss leaders." A loss leader is a strategy where certain products are sold for a
5 below market price in order to stimulate overall store traffic, and to increase the likelihood of
6 selling other merchandise.³⁶ An important type of product that is often used as a loss leader is
7 recorded music, where "merchandisers ... often take a loss to sell CDs . . . , making up the
8 difference on sales of higher-priced goods."³⁷ Infringing recorded music, since it is offered at
9 prices below the legitimate market, thus can serve as a form of loss leader and a substantial draw
10 to a flea market. This benefits the flea market owner, as it increases traffic and encourages the
11 purchase of other goods and concessions.

12 Infringing recorded music serves as a draw in yet another way. Consumers prefer to shop
13 where they believe they are being smart shoppers and are obtaining bargains. For example, (i) a
14 survey of 670 different customers at a flea market found a statistically significant, positive
15 relationship between the response to the question, "It's fun shopping for bargains," and current
16 flea market expenditures.³⁸ This can be applied specifically to counterfeit goods; (ii) 129
17 customers were surveyed at both a mall and at a flea market, and the survey compared people who
18 had bought infringing merchandise with those who had not.³⁹ A statistically significant, positive
19 relationship was found between the response to the statement, "Buying counterfeit products
20 demonstrates that I am a wise shopper" with prior purchases of infringing products. Among the
21 infringing recorded music sold at the Marysville Flea Market were counterfeit recordings of this
22 type, i.e., exact duplicates of the original recordings. Thus, one of the main reasons for buying
23 infringing merchandise is the ability to get a very good deal. In the case of infringing recorded
24 music, this aspect of a "good deal" is represented by lower prices than for legitimate recorded
25 music and more music (i.e., songs or tracks) per recording. Furthermore, a statistically significant,
26 positive relationship was found between the response to the statement, "Counterfeit products are
27 just as good as designer products" with prior purchases of infringing products. This means that
28 consumers who buy infringing products believe they are getting value for the low prices they pay.

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Another study surveyed 435 customers at both a mall and at a flea market, and asked specifically about the preference for infringing CDs.⁴⁰ This study found that 30% of the people surveyed, which is a substantial amount for an illegal activity, would choose an infringing CD if it were offered at a substantial discount. Furthermore, those consumers who stated a preference for the infringing CDs were found to be significantly more satisfied with the price of the CD than those consumers who preferred the legitimate product. A conclusion of this research is that a segment of consumers who buy infringing products can be classified as "sly shoppers" who "are getting counterfeit products comparable to their legitimate counterparts, but at bargain prices."⁴¹ Another conclusion is that a second segment of consumers who buy infringing products can be classified as "economically concerned" as they preferred the lower prices of the infringing products, even though they felt that the product was inferior on one or more attributes compared to the legitimate version.

In summary, my analysis shows that low prices are a critical factor often cited by consumers as a reason for shopping at flea markets. Low prices draw consumers for a number of reasons: the purely economic reason that some consumers cannot afford (or believe they cannot afford) to pay higher prices for goods, especially goods like recorded music that are non-essential; psychologically, consumers like to consider themselves smart shoppers; and it is "fun" to find bargains.⁴² Consumers are attracted to the below market prices that infringing recorded music offers at the Marysville Flea Market. This attraction to shop at the Marysville Flea Market, which sells low priced infringing recorded music, helps not only the individual vendor who sells this music, but also the flea market owner, who benefits from the increased foot traffic that this creates.

5. Flea market buyers

In this section, I analyze what types of merchandise hold special appeal to the Marysville Flea Market customer. I conclude that consumers who are looking for infringing merchandise are particularly likely to consider shopping at the Marysville Flea Market.

A survey of 129 customers at a mall and at a flea market found that consumers surveyed at flea markets hold more positive attitudes toward buying infringing products than those surveyed at

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1 malls.⁴³ A second survey of 268 customers at a mall and at a flea market found that consumers at
2 the flea market are significantly more likely to admit to having purchased infringing products in
3 the past (46%) than consumers at malls (31%).⁴⁴ It was also found that, overall, 20% of those
4 surveyed admitted to specifically buying infringing CDs, while 30% admitted to having bought
5 infringing tape recordings. These are especially striking figures, given that survey respondents
6 often will not admit to purchasing illegal products, and suggests that the actual proportion who
7 bought infringing recorded music is even higher. Finally, survey participants were asked where
8 they purchased infringing merchandise, and flea markets were the location mentioned most (36%).

9 This is further supported by an in-depth study of a flea market that concluded that one of
10 the main themes of flea markets is freedom vs. rules.⁴⁵ This paper concluded that "... to many the
11 swap meet was not only a bastion of free enterprise, but also a symbol of the wild west and a place
12 where rules are minimal and are more of an interpersonal matter than a matter for external, more
13 formal authorities. Not only was the swap meet described as a 'thieves market,' but patrons and
14 sellers alike seemed to revel in sustaining the image that this was a thieves' hideout where all are
15 safe from the mainstream rules and law."⁴⁶ Furthermore, "... merchandise was prominent enough
16 to reinforce an atmosphere of defiance of traditional rules." Thus, when certain flea markets, such
17 as the Marysville Flea Market, make infringing recorded music an accepted part of the
18 merchandise sold, do nothing to discourage its sale, and implicitly condone it, consumers can then
19 feel more comfortable in shopping for and purchasing unlawful products in that environment.
20 This is supported by a paper that surveyed 3,621 customers who had bought a CD.⁴⁷ This paper
21 found a statistically significant, positive relationship between the response to the statement "I trust
22 stores that sell pirated CDs," and whether or not infringing CDs had been bought in the past.
23 Thus, people would rather buy infringing CDs from an established, permanent flea market since
24 the flea market has a history and can be trusted, and many vendors keep returning. Note also, that
25 "the credibility of permanent flea markets" is an important component of a flea market's appeal to
26 consumers.⁴⁸

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1 In sum, the Marysville Flea Market naturally draws people who are more comfortable with
2 buying infringing recorded music. Furthermore, these customers are more trusting of purchasing
3 this merchandise at flea markets, due to the permanence and credibility of these establishments.

4 **6. Who benefits from increasing the draw of customers to a flea market**

5 The sections above show how infringing recorded music increases the draw of customers
6 to the Marysville Flea Market. I also concluded that this increased draw directly benefits the flea
7 market owner. In this section, I further discuss how increasing the attractiveness of a flea market
8 results in a direct financial benefit to the owner.

9 One of the major goals of a multiple retail outlet owner is to maximize his or her profits.
10 A flea market owner can increase his or her revenues by charging rents to the vendors, charging
11 for admission or parking, and making money on food and other concessions in the center. In order
12 to maximize profits, the flea market owner needs to build traffic throughout the flea market, and to
13 determine the best way to draw in customers. Thus, flea market owners are concerned not only
14 with the sales at each individual vendor, but also with how each vendor serves as a general draw to
15 build traffic. This is because traffic serves to benefit the entire flea market, since consumers are
16 likely to shop at a number of different vendors in the center, and also purchase other items and
17 services such as food or entertainment. This conclusion is supported in an academic paper, where
18 it was found that "...the three things that matter most to tenants and to owners of a shopping center
19 alike are traffic, traffic, and traffic. Both need lots of customers – the more the better."⁴⁹

20 Flea market owners are also interested in the traffic that the vendors at their sites generate,
21 as this leads to increased profits for them. One flea market owner reported that more than half of
22 his revenues came from food sales, while the rest came from vendor space rentals paid in advance
23 and admission charges.⁵⁰ Furthermore, this owner reported that "he clears an estimated 15%
24 pretax with little risk." He also mentioned that his flea market is made to "create a happening."
25 Another flea market owner said that "People draw people," and that he sold millions of dollars
26 worth of food and drinks at 30% profit.⁵¹ This flea market owner also said that "We take a bite
27 out of everybody that comes in." The Marysville Flea Market falls squarely within this type of
28 flea market, as it appears that a very large percentage of its revenues are derived from the food,

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1 beer and snack concession sales that the flea market essentially monopolizes. In fact, I am
2 informed that the owner of the Marysville Flea Market contends that it barely breaks even on
3 booth rentals. Therefore, the increased traffic necessary to sell its food and drink is particularly
4 important to it. Increased traffic results in greater food sales, vendor sales, and rents, and more
5 vendors. As discussed in this Report, recorded music vendors (and particularly vendors of
6 infringing recorded music) will generate some of the additional traffic needed by flea market
7 owners (particularly the Marysville Flea Market) to be profitable. In line with this, one academic
8 paper reported that music outlets were an expected type of store in multiple retail outlets, and that
9 "the developer [is] interested not just in individual store profits, but also in the traffic they
10 generate throughout the center."⁵²

11 Once these customers are drawn to a flea market, they are likely candidates to return. A
12 paper, which surveyed 670 customers at a flea market, found a statistically significant, positive
13 relationship between the response to the question, "I expect to buy more in the next year," and
14 their current flea market expenditures.⁵³ The Marysville Flea Market owner again benefits from
15 this increased loyalty by selling more food, and charging higher vendor rents. Thus, the
16 Marysville Flea Market owner gains both a current and a future financial benefit from increasing
17 the traffic at his market.

18 Increased traffic to the Marysville Flea Market results in increased spending on both
19 products (to the benefit of vendors) and on concessions (to the benefit of the flea market owners).
20 In turn, this draws additional vendors, filling up empty booths, permitting expansion and/or
21 increasing booth rental fees. Ultimately, this results in a greater value of the flea market generally.

22 23 CONCLUSION

24
25 My main conclusions are that infringing recorded music sold at the Marysville Flea Market
26 acts as a powerful draw for consumers because (1) recorded music adds variety to the available
27 merchandise, which is a major benefit to the Marysville Flea Market; (2) infringing recorded
28 music is a particularly attractive product category to the Marysville Flea Market visitors; (3)

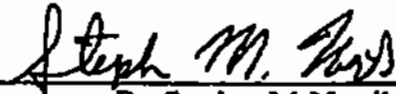
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1 infringing recorded music that consists of unique compilations of songs serves a significant benefit
2 to the Marysville Flea Market customers; and (4) the below market prices of infringing recorded
3 music at the Marysville Flea Market is a critical means of attracting visitors. The result is a direct
4 financial benefit to the Marysville Flea Market owner, Richard Sinnott, in several ways, as
5 discussed in this Report.

6 Date: October 3, 2003



Dr. Stephen M. Nowlis

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University of California at Berkeley, 1994

Thesis: Competitive Brand Strategies of High-Tier and Low-Tier Brands: A
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M.B.A. Haas School of Business, University of California at Berkeley, 1990

B.A. Economics, with Distinction, Stanford University, 1986

Academic employment

Professor, WP Carey School of Business, Arizona State University, Tempe, AZ, 2003-
Dean's Council of 100 Distinguished Scholars, WP Carey School of Business,
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Center for Services Leadership Distinguished Research Fellow, WP Carey School of
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Associate Professor, WP Carey School of Business, Arizona State University, Tempe, AZ,
2000-2003

Assistant Professor, WP Carey School of Business, Arizona State University, Tempe,
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Assistant Professor, Washington State University, Pullman, WA, 1994-1996

Professional service

Associate Editor, *Journal of Consumer Research*, 2002-

Editorial Review Board, *Journal of Consumer Research*, 2000-

Editorial Review Board, *Marketing Letters*, 2001-

Editorial Review Board, *Journal of Marketing Research*, 2001-

Ad-Hoc Reviewer, *Journal of Marketing*, *Journal of Consumer Psychology*, *Management Science*, *Journal of Retailing*, *Industrial and Corporate Change*, Reviewer for Association for Consumer Research conferences, American Marketing Association conferences, AMA John A. Howard Doctoral Dissertation Competition, Society for Consumer Psychology conferences. Program Committee, Association for Consumer Research conference, 2001 and 2003. Representative of the Society for Consumer Psychology at the main meeting of the American Psychological Association, 2001.

Honors and Awards

Outstanding Reviewer Award, *Journal of Consumer Research*, 2002.

Winner of the 2001 William F. O'Dell Award. Given for the article appearing in the *Journal of Marketing Research* in 1996 that has made the most significant long-term contribution to the marketing discipline in the five year period 1996-2001.

Finalist (top 4) for the 2002 William F. O'Dell Award. Given for the article appearing in the *Journal of Marketing Research* in 1997 that has made the most significant long-term contribution to the marketing discipline in the five year period 1997-2002.

Winner of the 2001 Early Career Contribution Award from the Society for Consumer Psychology – Sheth Foundation, Division 23, American Psychological Association. Given annually to the most productive researcher in the field of consumer behavior/marketing who has been a faculty member for less than ten years.

Winner of Best Theoretical Paper award (Stephen M. Nowlis and Deborah B. McCabe), "Online vs. Off-line Consumer Decision Making: The Effect of the Ability to Physically Inspect Merchandise," at 2nd INFORMS "Marketing Science and the Internet: Understanding Consumer Behavior on the Internet," conference, sponsored by Andersen Consulting and the Marshall School of Business, April 29 - 30, 2000. Prize paid \$2500.

AMA Consortium faculty participant, 2003

Association for Consumer Research Doctoral Symposium speaker, 2002

Nominated by the Arizona State University Marketing Department and Finalist (top 4), College of Business Undergraduate Teaching Excellence Award, 1997-1998 and 1998-1999.

Voted Outstanding Graduate Student Instructor, Haas School of Business, University of California at Berkeley, 1992-1993

Winner of Delbert Duncan Award for Best Marketing MBA student, 1988-1990

Publications

Nowlis, Stephen M. and Deborah B. McCabe (2003), "The Effect of Examining Actual Products or Product Descriptions on Consumer Preference," *Journal of Consumer Psychology*, 13 (4), forthcoming.

Nowlis, Stephen M., Barbara E. Kahn, and Ravi Dhar (2002), "Coping with Ambivalence: The Effect of Removing a Neutral Option on Consumer Attitude and Preference Judgments," *Journal of Consumer Research*, 29 (December), 319-334.

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Itamar Simonson, Ziv Carmon, Ravi Dhar, Aimee Drolet, Stephen M. Nowlis (2001), "Consumer Research: In Search of Identity," *Annual Review of Psychology*, 52, 249-275.

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Ravi Dhar and Stephen M. Nowlis (1999), "The Effect of Time Pressure on Consumer Choice Deferral," *Journal of Consumer Research*, 25 (March), 369-384.

Nowlis, Stephen M. and Itamar Simonson (1997), "Attribute-Task Compatibility as a Determinant of Consumer Preference Reversals," *Journal of Marketing Research*, 34 (May), 205-218. This paper was a finalist for the 2002 O'Dell Award. A Brief of this paper is written by John T. Landry in *Harvard Business Review* (1996), 74 (November/December), 13.

Nowlis, Stephen M. and Itamar Simonson (1996), "The Effect of New Product Features on Brand Choice," *Journal of Marketing Research*, 33 (February), 36-46. This paper won the 2001 O'Dell Award.

Nowlis, Stephen M. (1995), "The Effect of Time Pressure on the Choice Between Brands that Differ in Quality, Price, and Product Features," *Marketing Letters*, 6(4), 287-295.

Simonson, Itamar, Stephen M. Nowlis, and Katherine Lemon (1993), "The Effect of Local Consideration Sets on Global Choice Between Lower Price and Higher Quality," *Marketing Science*, 12 (4), 357-377

Simonson, Itamar, Stephen M. Nowlis, and Yael Simonson (1993), "The Effect of Irrelevant Preference Arguments on Consumer Choice," *Journal of Consumer Psychology*, 2 (3), 287-306.

Industry experience

Assistant Buyer, May Company Department Stores, Los Angeles, CA, 1986-1988

Professional affiliations

American Marketing Association
Association for Consumer Research
Society for Judgment and Decision Making
Society for Consumer Psychology

Conference presentations

"The Effect of a Forced Delay after Choice on Consumption Enjoyment," (with Deborah McCabe and Naomi Mandel), *Society for Consumer Psychology* conference, New Orleans, LA, February 2003.

"Effects of Distraction While Consuming a Food Item: Will it Increase or Decrease Subsequent Choice," (with Baba Shiv), *Society for Consumer Psychology* conference, New Orleans, LA, February 2003.

"The Effect of a Delay between Choice and Consumption on Consumption Preference," (with Deborah McCabe and Naomi Mandel), *Association for Consumer Research* conference, Atlanta, GA, October 2002.

"Effects of Distraction while Consuming a Food Item: Will it Increase or Decrease Subsequent Choice?," (with Baba Shiv), *Association for Consumer Research* conference, Atlanta, GA, October 2002.

"Consumer research in computer mediated environments," (with Sharon Shavitt), *Association for Consumer Research* doctoral symposium, Atlanta, GA, October 2002.

"The Effects of Generating Options on Judgment and Choice," (with Ravi Dhar), *Association for Consumer Research* conference, Austin, TX, October 2001.

"Developing Synergies Between Promotional and Brand Strategies," (with Katherine Lemon), *Association for Consumer Research* conference, Salt Lake City, UT, October 2000.

"The Effect of the Ability to Inspect Merchandise on the Likelihood of Choosing Products Online," (with Deborah B. McCabe), *American Marketing Association* summer marketing educators' conference, Chicago, IL, August 2000.

"Managerial Strategy Making: Problem Structuring and Alternative Generation by Marketing Managers," (with Gabriel R. Gonzales), *American Marketing Association* summer marketing educators' conference, Chicago, IL, August 2000.

"Online vs. Offline Shopping Experiences," (with Deborah Brown McCabe), *INFORMS "Marketing Science and the Internet"* Conference, USC, Los Angeles, April 2000.

"The Effect of Physically Inspecting Merchandise on Product Choice in Store and Online Environments," (with Deborah McCabe), *Haring Symposium*, Indiana University, Bloomington, IN, April 2000.

"The Effect of Alternative Generation on Preference for Hedonic and Utilitarian Goods," (with Ravi Dhar and Steven J. Sherman), *Society for Judgment and Decision Making*, Los Angeles, CA, November 1999.

"Comparison Processes in Consumer Choice," (with Ravi Dhar and Steven J. Sherman) *Association for Consumer Research* conference, Columbus, OH, October 1999.

"Brand Switching Between Quality Tiers: The Role of Price Promotions and the Choice Context," (with Itamar Simonson), *Marketing Science* Conference, Berkeley, CA, March 1997.

Co-Chair of session, "How Do I Prefer Thee? Let the Way Decide for Me: An Examination of Task Effects and Consumer Preference Formation," (with Ziv Carmon) and presenter of "The Effect of Providing Reasons and Being Evaluated by Others on Consumer Decision Making," *Association for Consumer Research* conference, Tucson, AZ, October 1996.

Chair of session, "Moderators of Consumer Response to Promotions," and presenter of "The Effect of Choice Set Composition on Consumer Response to Sales Promotions," *Association for Consumer Research* conference, Minneapolis, MN, October 1995.

Co-chair of session, "The Constructive nature of Consumer Response to Differential Product Advantages," (with Ziv Carmon), and presenter of "The Effect of Response Mode on Consumer Decisions Involving Overall Brand Quality, Price, and Product Features," *Association for Consumer Research* conference, Boston, MA, October 1994

Co-chair of session, "A Later Mover Advantage? The Impact of Order of Entry and Brand Characteristics on Consumer Preferences," (with Jennifer Aaker), and presenter of "The Effect of

Differentiating Product Features on Brand Choice," (with Itamar Simonson), *Association for Consumer Research* conference, Nashville, TN, October 1993

"Influences on the Decision to Purchase Product Enhancements," (with Itamar Simonson), National *ORSA/TIMS* Conference, San Francisco, CA, November 1992

"The Effect of Paired Comparisons and Product Display Format on Choices Between Lower Price and Higher Quality," (with Itamar Simonson and Katherine Lemon), *Association for Consumer Research* conference, Vancouver, British Columbia, October 1992.

"Influencing Consumer Preferences Between High and Low Price Alternatives," (with Itamar Simonson and Katherine Lemon), *Marketing Science* Conference, London, England, July 1992.

"Managing the Marketing Mix to Increase Frequent use of Consumer Services," (with Jukka M. Laitamaki and Ross Bellingham), *AMA's Services Marketing* Conference, Chicago, IL, October 1990.

College service

Department

Doctoral Studies Committee and Recruiting Sub-committee, 1996-2002
Faculty Recruiting Committee 2001-2002
Doctoral Exam Committee, 1998-2002
Personnel Committee, 1996-1997
Performance Review Committee, 1996-1997 and 1998-1999
Curriculum Teams: Fundamentals, 1996-1999
Curriculum Teams: Retailing, Services, Promotion, 1996-1999
Curriculum Teams: Mkt502, 2000-2002, coordinator
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E-learning and E-marketing team, 1998-2002

College

College of Business (COB) Assessment Committee, 1998-1999.
EBusiness Task Force, 1999-2000. Meets to determine how to infuse ecommerce into the COB curriculum.
Search Committee for the Russell Chair, 2000-2002.

Expert Witness Consulting

Marcia Spielholz v. Los Angeles Cellular Telephone Company, April 2002

California Consumers v. BMG Direct Marketing, Inc., November 2002